Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Establishment of a Class A Television Service	)	MM Docket No. 00-10
	)	

OPPOSITION OF THE NATIONAL CABLE TELEVISION ASSOCIATION TO PETITION FOR RECONSIDERATION

The National Cable Television Association ("NCTA"), by its attorneys, hereby files its opposition to the petition for reconsideration of Paging Associates, Inc. ("PAI") in the above-captioned proceeding.[1]

INTRODUCTION

In its petition for reconsideration, PAI asserts, among other things, that the Commission mistakenly precluded Class A low power television ("LPTV") stations established pursuant to the Community Broadcasters Protection Act ("CBPA")[2] from obtaining the same mandatory carriage rights as full-power stations on cable systems.[3] PAI's claim is without merit and should be rejected by the Commission.

Section 614 establishes two separate sets of must carry eligibility requirements for two distinct classes of television stations – "local commercial television stations" and "qualified low power stations." PAI would like Class A low power stations to be treated as "local commercial

---

1 *See In the Matter of Establishment of a Class A Television Service*, Report & Order, MM Docket No. 00-10, FCC 00-115 (rel. April 4, 2000) ("*Class A Order*").

2 Community Broadcasters Protection Act of 1999, Pub. L. 106-113, 113 Stat. App. I. at 1501A-594 - 1501A-598 (1999), *codified at* 47 U.S.C. § 336(f) ("CBPA").

3 *See Petition for Reconsideration, Or Alternatively, for Clarification of Paging Associates, Inc.*, filed in MM Docket No. 00-10, at ¶14 (June 7, 2000) ("PAI Petition").

television stations." But the statute defines that term to include only "full power" stations and expressly excludes "low power stations...which operate pursuant to part 74 of title 47, Code of Federal Regulations, or any successor regulations thereto." The new Class A stations are, by definition, "low power" – and, therefore, not "full power" – stations. Moreover, the Commission's rules for Class A stations are "successor regulations" for purposes of the express statutory exclusion.

The legislative history confirms that Congress had no intention to modify in any way the must carry rules for LPTV stations. Congress' principal aim in enacting the CBPA was to afford LPTV stations an opportunity to avoid displacement by full-power stations, particularly during the transition to digital television. It is inconceivable that Congress would have effected the significant expansion of must carry contemplated by PAI without mentioning the issue once in the statute or the accompanying conference report. When Congress enacted must carry in the 1992 Cable Act, it provided elaborate justifications for doing so in the legislative history, including a lengthy defense of the constitutionality of the statute. Those must carry rules have also been the subject of extensive litigation in the courts as well as numerous Commission rulemakings. Against this backdrop, PAI cannot reasonably claim that Congress intended a major revision to the must carry rules *sub silentio*.

I. PAI IS INCORRECT IN SUGGESTING THAT A CLASS A STATION MAY BE ELIGIBLE FOR MANDATORY CARRIAGE AS A "LOCAL COMMERCIAL TELEVISION STATION" UNDER SECTION 614 OF THE COMMUNICATIONS ACT.

PAI contends that Class A broadcast stations should be afforded the same must carry rights as "local commercial television stations."[4] However, Section 614(h)(1)(A) defines a "local

[4] *See id.* at ¶¶13-14.

commercial television station" as "any full power television broadcast station . . . licensed and operating on a channel regularly assigned to its community by the Commission[.]"[5] Class A stations, like any other LPTV station, operate at low power. Hence, by definition, Class A stations cannot qualify as "local commercial television stations" and cannot avail themselves of the special must carry rights accorded such stations.[6]

Moreover, Section 614(h)(1)(B) expressly excludes from the definition of "local commercial television stations" any low power television stations "which operate pursuant to part 74 of title 47, Code of Federal Regulations, or any successor regulations thereto."[7] PAI asserts that the new rules under which Class A stations will be licensed are not "successor regulations" to the Part 74 rules under which they were formerly licensed simply because those new rules appear in Part 73.[8] This assertion makes no sense and cannot withstand scrutiny. In establishing the new Class A license for qualifying LPTV stations, Congress did nothing to alter the fundamental character of those stations as low-power broadcast services.[9] Rather, Congress adopted the CBPA to enable certain low-power stations to avoid displacement by full-power

---

5 *See* 47 U.S.C. § 534(h)(1)(A) (emphasis added). PAI references this definition in its Petition as well, but fails to explain how a Class A station could satisfy the "full power" requirement. *See* PAI Petition at ¶10.

6 PAI attempts to evade this definitional requirement by arguing that Class A stations are not LPTV stations, but rather "full service" stations. *See id.* at n. 1. This distinction is irrelevant. As noted, the relevant statutory test is whether the station is "full power," not whether it is "full service," and Class A stations are not "full power." Likewise, PAI's request for *de facto* membership under the Table of Allotments, *see id.* at ¶16, would be similarly unavailing because such membership would not change the fact that Class A stations are not "full power" stations.

7 47 U.S.C. § 534(h)(1)(B)(i) (emphasis added).

8 PAI Petition at n. 1 ("Part 73 is not a successor regulation to Part 74"). In its Order, the Commission decided to regulate Class A stations under Part 73 of its rules. *See Class A Order* at ¶23.

9 While the CBPA affords "roughly similar regulatory status" to Class A stations, *see* 145 Cong. Rec. S14724-14725 (daily ed. Nov. 17, 1999) ("Section-by-Section Analysis"), it does not convert those stations into "full power" stations.

stations, particularly during the DTV transition,[10] if they satisfied various Part 73 licensing requirements.[11] The new Part 73 rules for Class A stations are, therefore, more properly viewed as "successor regulations" for a select group of LPTV stations previously regulated under the Part 74 rules.[12]

II. THE COMMISSION CORRECTLY CONCLUDED THAT NOTHING IN THE NEW RULES FOR CLASS A STATIONS AFFECTS THE ELIGIBILITY OF THOSE STATIONS FOR MUST CARRY UNDER THE EXISTING MUST CARRY RULES FOR "QUALIFIED LOW POWER STATIONS."

PAI asserts in its Petition that "there is no reason to believe the Commission itself intended to deny Class A stations mandatory carriage,"[13] and cites the Commission's statement in the Report and Order that "[n]othing in this *Report and Order* is intended to affect a Class A LPTV station's eligibility to qualify for mandatory carriage under 47 U.S.C. § 534."[14] But this does not mean, as PAI contends, that the Commission intended to confer on Class A low power stations the full must carry rights of "local commercial television stations." The Commission's point was simply that Class A LPTV stations regulated under the Part 73 rules could still be "qualified low power stations" eligible to assert the same limited must carry rights to which they

---

[10] *See* Section-by-Section Analysis at S14724-14725 (providing rationale for Class A license); *Class A Order* at ¶¶4-5 (noting that the DTV transition will have "significant adverse effects on many [LPTV] stations" and that "Congress sought to address some of these issues by providing certain low power stations 'primary' spectrum use status").

[11] As the Commission's Order notes, certain Part 73 provisions will not apply to Class A facilities, including: (1) the NTSC and DTV Table of Allotments; (2) mileage separations; and (3) minimum power and antenna height requirements. *See id.* at ¶27.

[12] Even if the new Part 73 rules for Class A stations were not "successor regulations," Class A stations would, of course, still not qualify for must carry as "local commercial television stations" because, as noted, they are not "full power" stations.

[13] *See* PAI Petition at ¶14.

[14] *Class A Order* at n. 61.

were previously entitled under Sections 614(c) and 614(h)(2) of the Communications Act.[15] Indeed, if PAI were correct that the Commission intended to greatly *expand* the must carry rights of Class A stations by treating them as "local commercial television stations" instead of "qualified low power stations,"[16] why would it have said that "nothing in the *Report and Order* is intended to affect" those stations' rights?[17]

III. NEITHER THE LEGISLATIVE HISTORY OF THE CBPA NOR THE HISTORY OF MUST CARRY GENERALLY SUPPORTS PAI'S CLAIM THAT CONGRESS INTENDED TO CHANGE THE MUST CARRY RULES WHEN IT ENACTED THE CBPA.

PAI notes in its Petition that "[i]t was surely not the intent of Congress to make Class A stations subject to the same license terms and renewal standards as required for full power television stations while at the same time denying them one of the most important rights and privileges afforded to full power stations," namely mandatory carriage.[18] PAI is wrong for a number of reasons. As noted above, Congress enacted the CBPA because it was concerned that if LPTV stations did not at least have the opportunity to qualify for "primary" spectrum use status, many would be "bumped" off-the-air by full-power stations, particularly during the transition to digital television when full-power stations would broadcast both analog and digital

---

[15] In particular, Section 614(h)(2) sets out specific criteria that a "qualified low power station" must satisfy to be eligible for must carry under Section 614(c).

[16] *Compare* 47 U.S.C. § 534(b) (mandatory carriage rights of local commercial television stations) *with id.* §534(c) (mandatory carriage rights for qualified low power stations).

[17] The fact that the Commission's rules require Class A stations to retain records of any election between must carry and retransmission consent hardly indicates, as PAI contends, that the Commission must have intended to grant Class A stations the full must carry rights of "local commercial television stations." If a Class A licensee qualifies for must carry as a qualified low power station, then such licensee has an obligation under the new rules to retain records of its election of mandatory carriage or retransmission consent. *See Class A Order* at App. A (revised rule for 47 C.F.R. §73.3526(a)(15)).

[18] *Id.*

signals.[19] Neither the CBPA nor the accompanying conference report, however, make a single reference to the must carry rights of Class A licenses. In fact, the lone reference to mandatory carriage in the full legislative history suggests that none of the participants in the legislative process, including representatives from the LPTV community, believed that the CBPA would alter the must carry rules.[20]

It is inconceivable that Congress would make such a significant change in the must carry rules *sub silentio*. Must carry has been one of the most contentious issues in the communications industry over the last two decades. When Congress enacted the must carry requirements in the 1992 Cable Act, it provided a detailed discussion of the First Amendment and other issues associated with must carry, its rationale for adopting the rules, and a section-by-section analysis of the statutory language.[21] Congress also included in the legislative history of the 1992 Act a clear statement on its reasons for adopting a limited must carry right for LPTV stations.[22] That Congress would, as PAI suggests, expand by inference the must carry rights for LPTV stations now licensed under the new Part 73 rules defies congressional practice in this area and common sense.

---

19 *See* Section-by-Section Analysis at S14725; *Class A Order* at ¶¶4-5.

20 *See Regulatory Classification of Low-Power Television Licensees Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce*, 106th Cong., 1st Sess. 51 (1999) (letter from George E. DeVault, Jr., President, Houston Valley Broadcasting Corporation, to the Hon. W.J. "Billy" Tauzin, Chairman, Subcommittee on Telecommunications, Trade, and Consumer Protection) (May 11, 1999) ("[E]ven under the proposed law almost no LPTV stations -- regardless of status -- would enjoy the supreme privilege all full power stations enjoy (even if they don't originate one minute of local programming each week), 'must carry' on area cable systems.")

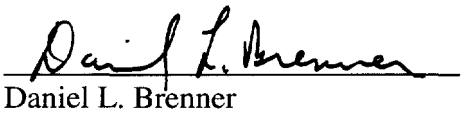
21 *See* S. Rep. No. 92, 102d Cong., 1st Sess. 53-62 (1991) (constitutionality of signal carriage requirements); H. Rep. No. 628, 102d Cong., 2d Sess. 47-74 (1992) (rationale for must carry requirements and constitutional issues); H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 66-74 (1992) ("Conference Report") (section-by-section analysis of final bill).

22 *See* Conference Report at 74 ("The conferees believe that, in communities in which residents have limited access to the signals of full power stations providing local news and information, the public interest in receiving local news and information warrants carriage of such low power stations.")

CONCLUSION

For the foregoing reasons, NCTA respectfully urges the Commission to reject the petition for reconsideration of PAI.

Respectfully submitted,



Daniel L. Brenner
Diane B. Burstein
Michael S. Schooler
1724 Massachusetts Avenue, NW
Washington, DC 20036
(202) 775-3664
Counsel for the National Cable Television Association

Of Counsel:

Michael H. Hammer
Jonathan A. Friedman
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, NW
Washington, D.C. 20036
(202) 328-8000

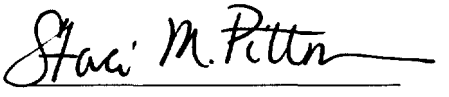
July 7, 2000

CERTIFICATE OF SERVICE

I, Staci M. Pittman, do hereby certify that a copy of the **Opposition of the National Cable Television Association to Petition for Reconsideration** was served first-class mail, this 7th day of July, 2000, upon the following:

Don Wang
International Transcription Service
1231 20th Street, N.W.
Washington, DC 20036-2307

Robert C. Knapp
Vice President & General Manager
Paging Associates, Inc.
24 Rockdale Road
West Haven, CT 06516



Staci M. Pittman